

**United States Department of Labor
Employees' Compensation Appeals Board**

C.R., Appellant

and

**DEPARTMENT OF THE NAVY, OFFICE OF
GENERAL COUNSEL, Pensacola, FL,
Employer**

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**Docket No. 17-0964
Issued: September 9, 2019**

Appearances:

Capp P. Taylor, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:

CHRISTOPHER J. GODFREY, Chief Judge

ALEC J. KOROMILAS, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

On April 3, 2017 appellant, through counsel, filed a timely appeal from a February 15, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The Board docketed the appeal as No. 17-0964.

On October 11, 2013 appellant, then a 51-year-old temporary legal assistant, filed a traumatic injury claim (Form CA-1) alleging that on October 1, 2013 she injured her back at work.² She stopped work on October 1, 2013 and did not return.³ By decision dated May 15, 2014, OWCP accepted her claim for aggravation of lumbar impingement syndrome.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² Appellant stated that computer wires got caught on the wheel of her chair and that she had bent down to push the wires to the back of her desk and away from her chair. When she got up from her bent position, she experienced a sharp pain in her back. Appellant's temporary appointment expired on December 19, 2014.

³ Appellant received continuation of pay from October 2 through November 15, 2013.

By decision dated August 27, 2014, OWCP denied appellant's Form CA-7 claim for compensation for the periods November 18, 2013 to January 12, 2014 and February 27 through August 27, 2014. It found that the evidence of record failed to establish disability due to the accepted work injury during the periods claimed.

OWCP received an August 19, 2014 report from Dr. Clark S. Metzger, an orthopedic surgeon, and a report from Dr. Aaron B. Stein, a Board-certified pain management specialist and anesthesiologist.

On January 5, 2015 OWCP received appellant's request for reconsideration. It also received a January 28, 2015 report from Dr. Joseph McGowin, III, a Board-certified orthopedic surgeon and second opinion specialist, for which it requested clarification on February 10, 2015.

By decision dated March 2, 2015, OWCP denied modification of its August 27, 2014 decision. It only considered Dr. Stein's report, and found that it did not contain a complete and accurate history of injury and was not contemporaneous with the periods of compensation claimed.

OWCP subsequently received Dr. McGowin's March 10, 2015 addendum report. On June 24, 2015 it expanded acceptance of the claim to include aggravation herniated lumbar disc.⁴

On June 28, 2016 OWCP received appellant's Form CA-7 claim for wage-loss compensation for disability from work during the period November 18, 2013 to May 31, 2016. In a July 1, 2016 letter, it indicated that no further action would be taken on the wage-loss claim as a formal decision had already been issued denying the claim for compensation for the period November 18, 2013 to May 31, 2016.

On October 24, 2016 appellant, through counsel, requested reconsideration of OWCP's July 1, 2016 letter, which he contended was essentially a decision. Counsel also argued that the medical reports submitted established appellant's entitlement to wage-loss compensation benefits as she was not capable of performing her normal duties during the claimed period.

On December 12, 2016 appellant requested reconsideration of OWCP's July 1, 2016 letter was a formal decision, which denied appellant's claim for compensation for the period November 18, 2013 to May 31, 2016. He contended that the claims examiner was refusing to process wage-loss benefits for the period June 1 through November 21, 2016 on the basis of the August 27, 2014 and March 2, 2015 decisions. Counsel noted that on June 24 and October 6, 2015 OWCP had expanded acceptance of the claim to include additional conditions. He argued that expansion of the accepted conditions and the second opinion report of October 5, 2016 confirmed disability and causation since the date of the accident and, together with the additional new evidence, supported and provided medical opinion that appellant was not capable of performing her normal duties, which entitled her to wage-loss compensation benefits. Counsel concluded that appellant had presented new legal argument such that she had overcome her burden of proof despite the fact that the August 27, 2014 and March 2, 2015 decisions were more than one year old.

⁴ On October 6, 2015 OWCP reaffirmed its acceptance of the claim to include aggravation of herniated lumbar disc.

By decision dated February 15, 2017, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

The Board has considered the matter and finds that OWCP properly found that appellant's request for reconsideration, which OWCP received on December 12, 2016, more than one year after issuance of OWCP's March 2, 2015 decision, was untimely filed. The Board rejects counsel's argument that OWCP's July 1, 2016 letter was a formal decision. Section 10.126 of OWCP's regulations provides that a decision shall contain findings of fact and a statement of reasons.⁵ The letter did not identify itself as a final decision and OWCP attached no appeal rights for appellant to pursue. Further, the content of the letter was informational in nature as a response to appellant's June 28, 2016 claim for wage-loss compensation for the period November 18, 2013 to May 31, 2016.⁶ The last merit decision of record was OWCP's March 2, 2015 decision. As appellant's request for reconsideration was not received by OWCP until December 12, 2016, more than one year after issuance of OWCP's March 2, 2015 decision, it was untimely filed.

However, having reviewed the case record submitted by OWCP, the Board finds that this case is not in posture for a decision. The Board notes that the underlying issue is wage-loss compensation due to appellant's accepted aggravation of lumbar impingement syndrome (thoracic or lumbosacral neuritis or radiculitis) and aggravation of a herniated lumbar disc. Evidence submitted in support of appellant's reconsideration request included reports from Dr. Metzger dated September 24, 2014 and Dr. Stein dated December 5, 2014. Dr. Metzger noted that appellant would be off work until she was seen by Dr. Stein. In his December 5, 2014 report, Dr. Stein opined that appellant was totally disabled due to work-related disc displacement/bulge at L4-5.

The Board notes that OWCP had only considered Dr. Stein's report in its March 2, 2015 decision.⁷ OWCP failed to mention or consider any other evidence, such as Dr. Metzger's report or the January 28, 2015 report from Dr. McGowin, its second opinion physician. Furthermore, prior to its March 2, 2015 decision, it had requested that Dr. McGowin clarify his report to explain how appellant's current diagnoses of lumbar disc herniation and lumbar radiculitis and inability to work were medically connected to the October 1, 2013 work injury. However, prior to receiving Dr. McGowin's March 10, 2015 addendum, OWCP denied modification of its August 27, 2014 decision. The Board finds that OWCP's failure to obtain the clarification report from Dr. McGowin after undertaking to develop the evidence in this case constituted error.⁸

Additionally, prior to the filing of her reconsideration request, OWCP expanded acceptance of the claim to include aggravation of herniated lumbar disc. It also had reports from Dr. Stein, Dr. Terry W. Taylor, Board-certified in occupational medicine and Dr. McGowin regarding the causal relation of her medical conditions and disability. It is noted that OWCP had referred appellant to Dr. Taylor on August 13 and November 17, 2015. Once OWCP undertakes to develop

⁵ 20 CFR § 10.126.

⁶ The Board notes that OWCP has not issued a formal decision addressing the full scope of appellant's wage-loss compensation claim.

⁷ See *A.F.*, Docket No. 11-1297 (issued December 20, 2011); *D.K.*, 59 ECAB 141 (2007) (evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case).

⁸ *Melvin James*, 55 ECAB 406 (2004).

the medical evidence further, it has the responsibility to do so in the proper manner.⁹ As it undertook development of the evidence by referring appellant to Dr. Taylor prior to appellant's request for reconsideration, OWCP had an obligation to secure the evidence if possible.¹⁰ Its failure to do so was error.

OWCP's summary findings in rejecting the evidence appellant submitted with her request for reconsideration does not comply with the review requirements under FECA and its implementing regulations.¹¹ Despite the untimeliness of appellant's request for reconsideration, the case must be remanded for OWCP to describe the evidence appellant submitted and give detailed reasons for accepting or rejecting appellant's claimed periods of disability.¹²

The Board will, therefore, set aside OWCP's February 15, 2017 decision and remand the case for issuance of an appropriate final decision.

IT IS HEREBY ORDERED THAT the February 15, 2017 decision of the Office of Workers' Compensation Programs is set aside and remanded to OWCP for further action consistent with this decision of the Board.

Issued: September 9, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

⁹ *Id.*

¹⁰ *See Peter C. Belkind*, 56 ECAB 580 (2005).

¹¹ *See* 20 CFR § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (February 2016); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹² *See also M.L.*, Docket No. 09-0956 (issued April 15, 2010).